Joseph Story
1811-1845.

PORTRAIT SUPPLEMENT.—"CASE AND COMMENT."
THE LAWYERS' CO-OPERATIVE PUBLISHING CO.,
ROCHESTER, N. Y.
NEW YORK:
79 NASSAU STREET.
JAN. 1901
CHICAGO:
116 MONROE STREET.

ROCHESTER, N. Y.
NEW YORK: 79 NASSAU STREET. JAN. 1901 CHICAGO: 116 MONROE STREET.

Case and Comment

NOTES OF

RECENT IMPORTANT, INTERESTING DECISIONS

INDEX TO ANNOTATION OF THE LAWYERS' REPORTS, ANNOTATED

LEGAL NEWS NOTES AND FACETIÆ

VOL. 7. JANUARY, 1901. No. 8.

CASE AND COMMENT

Monthly. Subscription, 50 cents per annum postpaid. Single numbers, 5 cents.

THE LAWYERS' CO-OPERATIVE PUB. CO., Rochester, N. Y.

NEW YORK, 79 Nassau St. CHICAGO, 116 Monroe St.

Entered at postoffice at Rochester, N. Y., as second-class mail matter.

Joseph Story.

No name in the list either of the judges or of the legal authors of this country is more familiar than that of Joseph Story. The intimate friend and associate of Chief Justice Marshall on the bench of the Supreme Court of the United States for nearly twenty-four years, he continued on that bench for about ten years after Marshall's death, making a record that in length of service has never been surpassed or equalled by any justice of that court except Marshall himself and Mr. Justice Field. As professor of law at Cambridge, and as author of treatises on the most important subjects of the law, he extended still more widely the reputation that he made as judge until he was doubtless the best known jurist of his time.

Joseph Story was born in the midst of the Revolutionary War, on September 18, 1779, at Marblehead, Massachusetts. His father was one of the daring patriots disguised as Indians, who poured the taxed tea into Boston harbor, and afterwards served as surgeon in the Continental Army. Joseph graduated from Harvard College second in rank to William Ellery Channing, who stood at the head of the class. Admitted to the bar when twenty-two years old, he began practice at Salem. In politics he was a Jeffersonian Democrat, and this, in a place where his brother attorneys were all Federalists, brought him many democratic clients. Politics also soon brought him an offer of the post of naval officer at Salem, but this he wisely declined. He was elected to the state legislature when twenty six years old, and, after an absence therefrom to serve one term in Congress at the age of twenty-nine, he went again to the state legislature, and was chosen speaker of the house of representatives. At the extremely early age of thirty-two, having been a member of the bar but ten years, during which he had been most of the time in legislative offices, he was appointed, without seeking the place, to the bench of the Supreme Court of the United States. His career on the bench was not only long, but in the highest degree eminent. If he lacked Marshall's commanding strength and incisiveness of mind in dealing with new and profound questions, he was so familiar with all the principles of law, so clear in his understanding of them, so judicial in his temper, and so sound in his judgments that he is rightly deemed to belong in the front rank of the judges of that court. His opinions are notable, not only for wealth of learning on all the various subjects of the law, but for a rare literary excellence. That aggravating and discreditable slovenliness, either of thinking or of expression, which makes it difficult to determine the exact meaning and effect of a few of the opinions of that court, never characterized the opinions of Story.

A professorship in Harvard Law School was offered him and accepted in 1829, when he had been eighteen years on the bench. His presence at once made the school famous,

and marked the beginning of its large development.

Story's legal authorship doubtless grew out of his work as lecturer in the law school. His treatises covered such leading subjects of the law as agency, bailment, bills and notes, partnership, equity jurisprudence, equity pleading, conflict of laws, and constitutional law. The reputation of these works became great at home and in England. Lord Campbell, in the House of Lords, is reported to have said that he was "greater than any law writer of whom England could boast, or whom she could bring forward since the days of Blackstone."

To general literature Story made some contributions. He wrote some poetry of mediocre quality, including an ambitious, but dry, tribute in verse to the "Power of Solitude." Of this he repented in later years, and destroyed all the copies of it that he could find. His miscellaneous writings include a wide variety of legal subjects, and in addition such matters as the science of government, the history and influence of the Puritans, development of science, literary characteristics of the time, and characteristics of the age. He was orator at several public occasions, including the centennial celebration of Harvard University and the meeting of the Suffolk bar, at which he delivered his memorial address on Chief Justice Marshall.

In his private life Story represented a high type of manhood. From the arrogance that is natural to crude and selfish characters he was altogether free. Full of labor, earnest in purpose, sincere and honorable in all relations, unspoiled by honors, he was always a gentleman of kindly spirit and courtesy.

Story's biography has been written by his son, William W. Story, the sculptor, who is himself the author of "Story on Contracts."

Original Packages for Retail Trade.

The Tennessee cigarette case, Austin *v.* State, in which the supreme court of Tennessee held that cigarettes were not legitimate articles of commerce, and that the court would take judicial notice of the fact that cigarettes are inherently bad and only bad, has just been affirmed by the Supreme Court of the United States on somewhat different grounds. Four justices of that court concur in an opinion by Mr. Justice Brown which denies that the court can take judicial notice of the deleterious character of cigarettes, and holds that they may constitute articles of commerce, but lays down the doctrine that an original package of commerce must be one such as is ordinarily shipped in the regular course of business by a manufacturer to a wholesale dealer in another state, and that it is not sufficient that the package is one actually shipped by a manufacturer to a dealer in another state. This is not the opinion of the majority of the court, though a majority agree in the conclusion that loose packages, each containing ten cigarettes, when taken by an express company in its own basket from a loose pile on the floor of the manufacturer and carried to another state, where they are emptied from the basket on the counter of the consignee, do not constitute original packages of commerce, but that, if there is any such package, it is the basket, Mr. Justice White, who concurs in this conclusion, pointing out the trifling value of each package, and the fact that it was not separately addressed, as important in connection with the other circumstances of the shipment. The other four justices dissent, not only on the ground that the statute prohibiting the sale of cigarettes is not a legitimate exercise of the police power, but also on the ground that these packages of cigarettes constitute original packages of commerce. They contend that there is no place to draw the line between small and large packages as packages of commerce, and that whatever package is actually shipped from one state to another in the course of business is an original package. The opinion of Mr. Justice Brown lays stress on the apparent intent to evade the law of the state to which the cigarettes were shipped; but it is not so much a matter of evading the state law as it is of asserting the protection of the Federal Constitution against the restrictions of the state law. Both the man who ships a small package and the man who ships a large package of goods into a state where their sale is prohibited, and where they can be sold only as original packages, of course intend that the goods shall be sold in defiance of the state law. The intent is as clear in case of the large package as it is in case of the small one.

The result of this decision is to leave the doctrine of original packages as applied to goods put up in form suitable for sale to consumers in a state of uncertainty.

A Persistent Fallacy.

It is something of a leap from the proposition that abutting owners are benefited by a street improvement to the conclusion that they must therefore be benefited to an amount equal to its total cost. Yet this seems to be the reasoning of some courts that uphold front-foot street assessments without regard to the amount of the benefits for which they are assessed. What appears to be an illustration of this is found in the opinion of the New York court of appeals in the recent case of Conde *v.* Schenectady, 58 N. E. 130, where it is said: "That the land abutting on the street is benefited by the pavement or repavement of the street, and should bear the expense, seems very clear." This ignores the fact that the amount of the benefits may be far less than the amount of the assessment. If the existence of special benefits is the only possible basis of a valid special assessment for a local improvement (and about this there can be no question), it must be equally true that the benefits must equal the assessment in amount. This is the unmistakable declaration of the Supreme Court of the United States in the case of Norwood *v.* Baker, where the court says: "The exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking under the guise of taxation of private property for public use without compensation." Such a taking the court holds to be in violation of the constitutional guaranty of due process of law. No doctrine was ever more clearly and unmistakably declared. The contention that it does not apply to the case of a street improvement is met by the fact that the authorities from state courts which were relied upon and approved by the Federal court in reaching that decision included cases of assessments for street pavements and other street improvements.

In distinguishing the case of a pavement from that of the opening of a street the New York court says the main object of the latter "may in special cases be, not to benefit the abutting land, but to afford access and communication between separate parts of the city or village, and thus inure to the advantage of the whole municipality." This assumes that such cannot be the object of a street pavement, but does not show why it cannot. As a matter of fact, an ordinance for a street pavement is not infrequently forced upon the abutting owners against their will for the benefit of other portions of the community. In one case that was vainly contested by the abutting owners in their state courts. Property was in effect confiscated to construct a pavement which they did not want for the benefit of other people over what was hardly more than a country road between the main part of the town and a fair ground.

The New York court also undertakes to distinguish the case of a street pavement from that of the opening of a street, which was actually involved in the Norwood Case, on the ground that the paving assessment is purely in the exercise of the power of taxation, while the street opening in the Norwood Case, in which there was an attempt to assess the cost of the strip taken upon the remaining lands of the same owner, was an exercise of the power of eminent domain as well as of taxation. But no question was made in the Norwood Case as to the right of the owner to compensation for the land taken in the exercise of eminent domain. The question was where the expense should be assessed. Would the principle have been different if the abutting land had been owned by another person instead of the person who owned the strip taken? The principle on which property is to be assessed for a local improvement can hardly depend on the mere accidents of its ownership. The assessment of the abutting land to pay for the strip of land taken, whether owned by the same person or not, must, according to the doctrine of the Norwood Case, rest upon the existence of benefits substantially equal to the assessment. The principle applies just as clearly to an assessment for repairing or remaking a street as it does to an assessment for the original cost of the street. In both cases it is a barrier against confiscating the property of a citizen for the benefit of the public. To impose upon abutting owners the cost of a local improvement made against their will, irrespective of benefits to them, or in substantial excess of the benefits received by them, is an injustice that certainly ought to be barred by some constitutional guaranty. The Supreme Court of the United States has found it to be a taking of private property for public use without just compensation, and therefore without due process of law. This re-establishes a constitutional barrier which some of the state courts had broken down to prevent the iniquity of confiscating private property.

Front-foot assessments may be just and constitutional if they do not exceed the actual benefits. Where the total cost of a street pavement is fairly found as a matter of fact to be equaled by the benefits to the abutting land on the street, front-foot assessments to distribute the cost among the different lot-owners may often constitute a fair method of apportionment. But front-foot assessments of the whole cost of a street improvement upon abutting owners without any finding that the benefits are equal thereto constitute an arbitrary imposition in utter defiance of constitutional rights.

Dissent from "The Consent of the Governed."

Lack of space prevents the publication, as a rule, of contributed articles or replies to editorials in CASE AND COMMENT. For once an exception will be made. The recent article on "The Consent of the Governed" has called out protests from three readers, one of whom has sent a reply for publication. Being much too large for a CASE AND COMMENT article, the parts least necessary to the argument have been omitted. The writer insists that the editor has put a strained meaning upon the words "consent of the governed," making them mean "individual consent to each act of government, whereas the true meaning is consent to the form and method of government;" that a denial of the theory of consent involves the adoption of the theory of force to compel inferior people to submit to their superiors, thus making a "benevolent despotism," which must "always end in tyranny;" that "there is no safety for the common people except in the theory that the just powers of government are derived from the consent of the governed; that the equal right of all men to participate in government is a natural right, and not one derived from gift or grant," any denial of which is an act of tyranny. His arguments against the editorial are as follows:

"There are but two theories of government anywhere in existence, namely, government by consent and government by force. Our theory of government is the former. We may not be able to reach it in perfection; there may be exceptions to its complete realization; . . . but that is not a reason why we should deny the principle, and fall back on the dangerous theory of government by force. Christianity has not secured the universal acceptance of the golden rule in actual practice, and yet it is not proposed to abrogate Christianity nor the golden rule. . . . All governmental progress has been toward government by consent. . . . Space will not permit a detailed examination of the exceptions cited under our government. But, referring briefly to them, it may be enough to say that this is not merely government by 'consent,' but a representative government, where the unborn are represented by the living, and the children by their elders, usually their fathers, until they reach the stage of maturity that gives them mental and physical capacity to take part in government on their own account. Since that age differs greatly in different children, the arbitrary age of twenty-one years is fixed, which is perhaps as good as any. The important point is that they have the right to participate when they reach that age, not as a gift or grant from some higher human power, but as a natural right whose exercise nature denied at an earlier age because of their incompetency. . . .

"In the case of women we may adopt the theory that, like children, they are represented; or the other theory, that they are wrongfully denied participation in government without their consent, in which case the exception is wrong, and not the principle; and if the latter be the correct theory, it is our duty to extend the franchise to women as rapidly as possible. There is some ground for the assumption that the first theory as to women is correct; that is, that they participate in government by representation with their consent; for if they were anywhere near unanimous in demanding the right of active participation in government, I apprehend it would not be denied them.

"As to the minority, they are not governed by the majority as stated. They take as active a part in government as do the majority. They consent in advance to abide by the determination of the majority. The writer speaks of the minority as a permanent body ruled by another permanent body, whereas the minority is a shifting body, who may be in the majority to-morrow. The minority on one question may be in the majority upon another. The minority opposed to the existence of one law may be in the majority favorable to dozens of other laws at the same time.

"The 'fatal weakness' of the consent theory is not shown by the case of the "pestilential fellow," for there is no such possible case as an inhabited locality without constituted

that the distinction is a sound one, there is no in character. Questions of public policy, that

government or established law. The very fact of compelling the fellow to exercise the decencies of civilized life would be the institution of government and the proof of existing law, even though it might not be found on paper, and his would be but the case of the minority. The writer involves himself in a contradiction, and might as well have spoken of a community where there are no established regulations compelling the 'pestilential fellow' to abide by the established regulations.

"The last instance mentioned, that of the Indian tribes, has no doubt been a denial by us of the theory of consent. Whether with a higher state of civilization on our part the right might have been exercised by the Indians; or whether under any circumstances it would have been impossible,—need not be argued here. It is certain that they have not prospered and multiplied under our guardianship; that government without their consent has not proven a blessing to them."

A few brief comments may be made on this writer's arguments. The critic repudiates any limitation of the doctrine of the consent of the governed, and insists that there can be no cases in which their consent is not necessary. Yet he says, "There may be exceptions to its complete realization," which seems to be dangerously near an admission of all that the editorial contends for, that consent is not *in all cases* necessary.

He admits that children are rightly denied self-government because of their incompetency to exercise it. The denial is not because of their age, but because of their incompetency. If adult persons are idiots, lunatics, or feeble minded they are on the same level in this respect with the infants. The same principle seems applicable to people who are so savage and barbarous as to be incapable of self-government with safety to the people around them.

The theory that for the purpose of giving consent to government "the unborn are represented by the living and the children by their elders" is ingenious and pleasing. It amounts to saying that consent is absolutely essential, but that a Pickwickian consent will do, and that this may be furnished for those who do not themselves consent by others who represent them without their consent.

The minority doubtless does usually consent to abide by the determination of the majority, but the question is, Is their consent necessary, and would the refusal of their consent make the government necessarily unjust?

The writer insists that, if the respectable people in a place where there were no constituted authorities compelled a vicious fellow to behave himself, this "would be the institution of government." So it would. But it would be done without the consent of the fellow who was compelled to submit.

In case of the Indian tribes the critic candidly admits that the theory of consent has been denied, but he cautiously avoids saying that it is unjust to govern them at all without their consent. It is not to the point to say that they may have been misgoverned. The question is whether government can be exercised over them at all without their consent. If so, the consent of the governed is not necessarily and in all cases a condition of just government.

The criticised editorial which expressly declares that government without the consent of the governed "will be unjust unless it recognizes their right to the largest measure of freedom and of self-government which they can safely exercise," merely applies the principle, neither novel nor heretical, that the right of the governed to participate in the government extends only to those who are competent to exercise it.

Legislative Power over Municipalities.

The limits on the power of the legislature over municipal corporations are not easily defined. The legislature has unquestionable power, unless restricted by the Constitution, to create such corporations, amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more of them into one, overrule their legislative action whenever it is deemed unwise in polity, or unjust, and even to abolish them altogether. Considered as mere agencies of government, municipalities are undoubtedly subject to the absolute control of the legislature, with the exception of their property rights. But many cases have recognized a two-fold character in such corporations—the one public as regards the state at large in so far as they are its agents in government, the other private in so far as they are to provide the local necessities and conveniences for their own citizens. Such cases deny the absolute control of the legislature over matters referable to their private, as distinguished from their public, character, but this distinction, while it may seem clear in its nature, is exceedingly difficult to apply. Conceding

that the distinction is a sound one, there is no very clear line of division between the matters which are public and those which are private. The power of taxation is usually regarded as public in its character. The creation of local improvements is in some cases regarded as public, and in others as private. The power of the legislature to compel a city to establish and pay for city parks has been upheld in one case and denied in others. A statute compelling a municipality to aid a railroad by subscribing to stock has been held unconstitutional, and the same has been held of a statute requiring the purchase of waterworks. But the legislature is generally held to have power to compel outlays by municipalities for public bridges, ferries, or highways. The case of State *ex rel.* Bulkeley *v.* Williams (Conn.) 48 L. R. A. 465, upholds a statute apportioning the expense of a public bridge upon towns that were benefited by it, and this decision was sustained by the Supreme Court of the United States. A note to this case on the power of the legislature to impose burdens upon municipalities, and to control their local administration and property, shows that most of the decisions regard the control of highways and bridges as public matters as to which the legislature may control the action of the municipalities.

The difficulty in placing a limit to the legislative control over municipal corporations, at least where their property rights are not concerned, is to find any constitutional restrictions upon it. This difficulty was obviated by Judge Cooley in People *ex rel.* Leroy *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103, by resorting to the doctrine of an implied constitutional guaranty to municipal corporations of the right of self-government in the exercise of their private functions, but some other courts have not been willing to accept this doctrine. They may be ready to approve of local self-government as a policy of legislation, but not as a constitutional right. It "cannot be doubted," says the Supreme Court of the United States, "that the power of the legislature over all local municipal corporations is unlimited save by the restrictions of the state and Federal Constitutions." The constitutional provision against deprivation of property without due process of law has been held in several cases to be applicable to municipal corporations. This provision can hardly be violated by any legislative control of municipal corporations in matters that are public, or at least those which are legislative in character. Questions of public policy, that is to say, may be determined by the legislature itself, instead of leaving them to the local body to decide. This may include the use of public funds for public purposes. The difficulty comes when there is an attempt to use the public funds or property for private purposes. For instance, if a municipal corporation happens to be the owner of a tract of land which is not used for any public purpose, but is simply an asset of the corporation, an attempt of the legislature to appropriate that property by ordering it to be sold and its proceeds turned into the state treasury would seem much like taking from the citizens of that municipality their private property for the benefit of the state. Property held by a city merely as a part of its assets or capital for possible future use is, in a very fair sense, like the property separately owned by the individual inhabitants. To take it away from them arbitrarily may well be deemed to be depriving them of property without due process of law. The same would be true of an attempt by the state permanently to appropriate for state purposes, without any compensation, the school buildings belonging to a city, and thus compel the city to build new ones at its own expense. It cannot be said that the courts have yet clearly defined the extent of the legislative powers in this direction, but there are several well-considered cases which declare the doctrine that municipal property held in a private capacity is within the protection of the constitutional provision as to due process of law.

Index to Notes

IN

LAWYERS' REPORTS, ANNOTATED.

Book 49, Parts 5 and 6.

Mentioning only complete notes therein contained, without including mere reference notes to earlier annotations.

The part containing any note indexed will be sent with CASE AND COMMENT for one year for $1.

Among the New Decisions.

Banks.

The power of the president of a corporation to bind it by contracts which, as appears by the note to Waite *v.* Nashua Armory Association (N. H.) 14 L. R. A. 356, exists by implication only so far as the custom or course of business of the company creates it, is held, in Wells, Fargo, & Co. *v.* Enright (Cal.) 49 L. R. A. 647, to exist in the president of a bank with respect to a contract waiving the defense of the statute of limitations, where he was the general manager, and allowed to act according to his judgment under a by-law giving him general supervision of the business.

The right of directors of a corporation to a preference as creditors, as to which great conflict in the authorities is shown in a note to Lyons-Thomas Hardware Co. *v.* Perry Stove Mfg. Co. (Tex.) 22 L. R. A. 802, is denied in James Clark Co. *v.* Colton (Md.) 49 L. R. A. 698, in case of an attempted preference by an insolvent bank by payment of a check of a company in which the president of the bank held most of the stock, and of a note on which the directors were indorsers, although at that time the bank had not committed any formal act of insolvency.

Bicycles.

On the subject of bicycle law, which was fully treated in a note in 47 L. R. A. 289, the case of Foote *v.* American Product Co. (Pa.) 49 L. R. A. 764, holds that a bicycle rider turning a corner on the right side of the street, in accordance with a rule fixed by ordinance, is not required to keep out of the way of a heavily laden wagon which he meets, unless some apparent necessity is shown therefor.

Bills and Notes.

The doctrine that the word "trustee" added to the name of the payee of a note does not destroy its negotiability is declared in the case of Central State Bank *v.* Spurlin (Iowa) 49 L. R. A. 661, and this is in harmony with the other authorities, as shown by the note to Fox *v.* Citizens' Banking & T. Co. (Tenn.) 35 L. R. A. 678.

Bills of Lading.

An assignee of a bill of lading with draft attached is held, in Finch *v.* Gregg (N. C.) 49 L. R. A. 679, to be liable, in case he receives payment of the draft, to an action for a return of the money in case the property covered by the bill does not comply with the contract. This decision is supported by that of Landa *v.* Lattin Bros. 19 Tex. Civ. App. 246, 46 S. W. 48, but the annotation shows that the authorities generally are to the effect that, if such a draft is accepted, the rights and liabilities of the parties are thereafter governed by the law of negotiable paper, unaffected by any of the equities that may exist between the original parties to the contract.

Building and Loan Associations.

Notice of withdrawal given by a member of a building and loan association is held, in Andrews v. Roanoke Building Association & I. Co. (Va.) 49 L. R. A. 659, not to be such a severance of his relation as to preclude him from bringing a suit for the appointment of a receiver and the winding up of the affairs of the company in a proper case. This is consistent with the doctrine of most of the cases, as shown in a note in 35 L. R. A. 290, to the effect that membership may continue for some purposes after notice of withdrawal, though there is some dispute in the cases as to the status of such a member.

Conflict of Laws.

The general rule that the *lex fori* governs in the trial of an action on a cause originating in another state is applied in Jones v. Chicago, St. P. M. & O. R. Co. (Minn.) 49 L. R. A. 640, by a decision that a Wisconsin statute making defects in railroad appliances presumptive evidence of knowledge thereof on the part of the company is not of any effect on the trial in Minnesota of a cause of action for injuries sustained in Wisconsin.

The provision in an application for life insurance made in another state to a New York company, that it is subject to the charter of the company and the laws of New York, is held, in Mutual Life Ins. Co. v. Cohen, Advance Sheets, U. S. 106, insufficient to make the policy issued thereon and which was delivered in such other state subject to the New York statute requiring notice as a condition for forfeiture for non-payment of premium.

Constitutional Law.

A penal ordinance prohibiting any colored netting or other material which has a tendency to conceal the true color or quality of the goods to be used for covering packages of fruit is held, in Frost v. Chicago (Ill.) 49 L. R. A. 657, to be a vexatious and unreasonable interference with, and restriction upon, the rights of dealers in fruit, and therefore void when based only on the general police powers of the city.

A statute creating a court of visitation to determine questions as to carriers' rates and services is held, in State *ex rel.* Godard v. Johnson (Kan.) 49 L. R. A. 662, to be unconstitutional and void as an attempt to mingle legislative, judicial, and administrative functions.

Legislative power to regulate the practice of professions, which is shown in a note in 14 L. R. A., on page 581, is held, in State v. Knowles (Md.) 49 L. R. A. 695, to extend to a statute creating a board of dental examiners which provides for the exemption from examination of graduates of a regular college of dentistry without also exempting graduates of other universities or colleges authorized to grant diplomas in dental surgery.

A statute requiring railroad companies to furnish track connections where their roads intersect, when this is necessary for the accommodation of the public, is upheld in Wisconsin, M. & P. R. Co. v. Jacobson, Advance Sheets, U. S. 115, against the objection that it deprives the railroad companies of their property without due process of law, notwithstanding the fact that they may be required to exercise the power of eminent domain and incur a comparatively small expense.

The right to alter, amend, or repeal a statute which constitutes a contract with a corporation is held, in Stearns v. Minnesota, Advance Sheets, U. S. 73, not to extend to a repeal of the provisions which were for the benefit of the corporation, such as an exemption from ordinary taxes, while leaving the company subject to all the obligations of the contract on its part, such as the payment of a percentage of gross earnings.

Contracts

The general rule that an intervening impossibility to perform a contract does not relieve from its obligation, as shown by the note in 14 L. R. A. 215, is applied in Pinkham v. Libby (Me.) 49 L. R. A. 693, deciding that the death of a stallion preventing an exercise of the privilege of return for second service does not create any failure of consideration which will give a right to repayment of the sum paid for a fruitless service.

Corporations.

The unlawfulness of secret profits of promoters of corporations, shown by a note in 25 L. R. A. 90, is emphasized in the case of Hayward v. Leeson (Mass.) 49 L. R. A. 725, which limits remuneration for their services to cases in which a full statement thereof is incorporated in the prospectus, or payment thereof is voted after all the stock has been taken by the public.

of a testamentary gift which will pass in so-

Partnership

Drains.

The assessment of the expense of constructing a drain under the New York statute upon other landowners as well as upon the petitioner is held, in *Re* Tuthill (N. Y.) 49 L. R. A. 781, to be in violation of the Constitution, which contemplates that the expense shall be borne by the petitioner alone.

Electricity.

Failure to insulate electric-light wires over a street at and above the point where they are fastened to a wooden awning is held, in Brush Electric Light & P. Co. *v.* Lefevre (Tex.) 49 L. R. A. 771, not to create any liability for the death of a person who got upon the awning and attempted to raise the wires in order to permit a house to be moved under them.

Eminent Domain.

A pier erected by the United States on land submerged under navigable water, the title to which is owned by the riparian proprietor, when this is done merely for the improvement of navigation, though it permanently destroys his access to the navigable waters, is held, in Scranton *v.* Wheeler, Advance Sheets, U. S. 48, to give him no right to any compensation under the constitutional provision requiring just compensation for property taken for public use, since the title to the land, whether owned by the riparian proprietor or by the state, was acquired subject to the rights which the public have in the navigation of such waters.

Evidence.

A presumption of negligence on the part of a railroad company when sparks issuing from a locomotive kindle a fire and destroy adjacent property is indulged by the court in McCullen *v.* Chicago & N. R. Co. (C. C. A. 8th C.) 49 L. R. A. 642, but is denied in Garrett *v.* Southern R. Co. (C. C. A. 6th C.) 49 L. R. A. 645. These cases illustrate the irreconcilable conflict of the authorities on this subject, which is shown by a note in 15 L. R. A. 40.

Habeas Corpus.

Habeas corpus to release a witness held under conviction for contempt in violation of his constitutional rights is upheld in *Ex parte* Miskimins (Wyo.) 49 L. R. A. 831, and this is in accordance with the practice which is shown by a note in 39 L. R. A. 450, to be established in the Federal courts, and in some, but not all, the state courts, though this use of the writ seems to be a violation of the doctrine that a judgment can be collaterally attacked only for want of jurisdiction.

Husband and Wife.

A wife living in the same house with her husband, and performing some of the duties of a wife, is held, in Bucknam *v.* Bucknam (Mass.) 49 L. R. A. 735, to be, nevertheless, entitled to sue for separate maintenance for lack of suitable support.

Injunction.

The right to an injunction against letters or notices threatening suits for infringement is sustained in A. B. Farquhar Co. *v.* National Harrow Co. (C. C. A. 3d C.) 49 L. R. A. 755, when the threats were not made in good faith, but solely for the purpose of destroying the business of a rival. This is in accord with some prior authorities found in a note in 16 L. R. A. 243, but in conflict with other decisions.

Insurance.

A forfeiture clause in a note given by the insured for premium on a life policy payable to his wife in case of his death, if it is more onerous than the provisions of the original contract, is held, in Union Cent. L. Ins. Co. *v.* Buxer (Ohio) 49 L. R. A. 737, to be ineffectual as against the wife, unless she assents thereto; and this decision is in accord with the general weight of authority shown by the annotation to the case, to the effect that the beneficiary's rights cannot be destroyed or affected by the insured in any other way than by allowing a lapse of the policy.

Immediate written notice required by an insurance policy to be given in case of accident and injury covered thereby is held, in Travelers' Ins. Co. *v.* Myers (Ohio) 49 L. R. A. 760, to be a notice within a reasonable time under the circumstances of the case, which is a question of law if the facts are not disputed.

The share of one of the beneficiaries of a benefit certificate who dies leaving issue during the life of the insured is held, in Supreme Council Catholic Knights of America *v.* Densford (Ky.) 49 L. R. A. 776, to be in the nature

of a testamentary gift which will pass in accordance with the statutory rule as to devises or legacies.

Interest.

Interest on advancements of land to some of the heirs of a person, made for the purpose of equalizing their shares with that of another, is held, in Wysong *v.* Rambo (Tenn.) 49 L. R. A. 766, to be allowable only from the death of the ancestor until the lapse of a reasonable time for the settlement of the estate.

Levy.

Protection to a sheriff by a writ of sequestration issued in conformity to law is denied in Vickery *v.* Crawford (Tex.) 49 L. R. A. 773, where he seizes property in possession of and owned by a stranger to the writ.

Mandamus.

A performance of conditions beneficial to a municipality on which a street-railway company is expressly required to accept from a city the use of streets is held, in People *ex rel.* Jackson *v.* Suburban R. Co. (Ill.) 49 L. R. A. 650, to be the performance of a duty to the public which may be compelled by mandamus, and not the performance of a mere private contract.

Municipal Corporations.

On the question, What constitutes an indebtedness within the meaning of constitutional and statutory restrictions? which is considered at length in a note in 23 L. R. A. 402, showing that the authorities are not agreed in respect to contracts for continuing services or benefits to be paid for out of current revenues, the recent case of South Bend *v.* Reynolds (Ind.) 49 L. R. A. 795, holds that such indebtedness is not created by a contract under which a person is to build a city hall upon city land, and lease it to the city with an option for purchase.

Negligence.

Going into a trench in a city street, filled with deadly gas, to rescue a boy who has been overcome therein by the gas while after a ball, is held, in Corbin *v.* Philadelphia (Pa.) 49 L. R. A. 715, not to be such negligence as will relieve the city from liability for the death of the person who attempts the rescue of the boy.

Partnership.

A contract between the owner of a farm and an occupant, by which each furnishes part of the seed, implements, and stock, and providing for division of the products or of the proceeds thereof, is held, in Shrum *v.* Simpson (Ind.) 49 L. R. A. 792, not to constitute a partnership so as to make the occupant a surviving partner on the death of the owner.

Physicians.

An injured person who follows the suggestion of a physician sent to him by a person whom he had sued for injuring him, and tries to stand on an injured leg after he and his own physician have said that he cannot bear his weight upon it, is held, in Pearl *v.* West End St. R. Co. (Mass.) 49 L. R. A. 826, to assume the risk of so doing.

Public Improvements.

A rural highway established by statute is held, in Sperry *v.* Flygare (Minn.) 49 L. R. A. 757, not to be such a local improvement as will sustain special assessments for benefits. The doctrine that local assessments must be limited by the amount of benefits received as declared by the United States Supreme Court in the case of Norwood *v.* Baker, 172 U. S. 269, 43 L. ed. 443, has been followed in Adams *v.* Shelbyville (Ind.) 49 L. R. A. 797, which at the same time sustains assessments on the basis of frontage, where the statute gives a hearing before assessment, and impliedly requires an adjustment of the assessments in conformity with the actual benefits.

Railroads.

The duty of keeping gates closed at a private farm railroad crossing is held, in Swanson *v.* Chicago, M. & St. P. R. Co. (Minn.) 49 L. R. A. 625, to devolve upon the landowner for whose benefit and convenience the gates are made.

The killing of a person on a railroad track in open daylight, on a straight piece of road, where he could be seen for 150 yards ahead of the train which struck him, is held, in Neal *v.* Carolina Central R. Co. (N. C.) 49 L. R. A. 684, not to make the railroad company liable, although the train was running at a prohibited speed and without ringing its bell as required by ordinance, or keeping a proper lookout,

where, up to the moment he was struck, he could have prevented the accident by stepping off the track.

Sale.

The rule that there is an implied warranty of the fitness of manufactured articles for the use for which they are purchased, as shown in a note in 22 L. R. A. 190, is held, in J. Thompson Mfg. Co. v. Gunderson (Wis.) 49 L. R. A. 859, not to extend to a contract to manufacture tobacco planting machines with steel shoes and gatherers, so as to imply a warranty that the machines will scour in the ordinary soil of the locality.

New Books.

"Unfair Trade." By James L. Hopkins. (Callaghan & Co., Chicago, Ill.) 1 Vol. $6.

"Law of Irrigation." By J. R. Long. (Keefe-Davidson Law Book Co. St. Paul, Minn.) 1 Vol. $5.50.

"Business Corporations of New York." By Frank White. (White Law Book Co. Albany, N. Y.), 1 Vol. Paper, $1.25.

"Syllabus Digest of U. S. Supreme Court Reports." By Russell & Winslow. (Banks Law Pub. Co. New York City.) 4 Vols. $26. Vol. 1 ready. $6.50.

"Whittaker's Code Forms." (Bowen-Merrill Co. Indianapolis, Ind.) 1 Vol. $6.

"Collier on Bankruptcy." 3d Ed. By James W. Eaton. (Matthew Bender, Albany, N. Y.) 1 Vol. $6.30.

"Morrison's Mining Rights." 10th Ed. (Smith-Brooks Printing Co. Denver, Col.) 1 Vol. $3.

"Taxpayers' Actions in New York." By John C. Thomson. (H. B. Parsons, Albany, N. Y.) 1 Vol. $2.

"Bryant's Code Forms." (Democrat Printing Co. Madison, Wis.) $6.50.

Recent Articles in Law Journals and Reviews.

"It is Not a State Legislative Function to Determine the Amount of Special Benefit of a Public Improvement to Adjacent Lands. Hence a Special Assessment Based on Such Determination Violates the Fourteenth Amendment."—51 Central Law Journal, 460.

"Undue Influence."—36 Canada Law Journal, 690.

"A Solicitor's Retainer."—36 Canada Law Journal, 651.

"An Afternoon in the House of Commons."—10 Yale Law Journal, 53.

"China and Japan: A Contrast."—10 Yale Law Journal, 46.

"The Roberts Case as Illustrating a Great Prerogative of Congress."—10 Yale Law Journal, 37.

"The Elasticity of the Constitution."—14 Harvard Law Review, 273.

"The Civil and Political Status of Inhabitants of Ceded Territories."—14 Harvard Law Review, 262.

"Teaching Law by Cases."—14 Harvard Law Review, 258.

"Contributory Negligence; Peril of Child; Rescue by Mother."—51 Central Law Journal, 446.

"Constitutional Amendments Taxing Mortgages."—51 Central Law Journal, 443.

"Recent Discussion of Tax Reform."—15 Political Science Quarterly, 629.

"War and Economica."—15 Political Science Quarterly, 581.

"Does the Relation of Landlord and Tenant Become Severed by Operation of the Bankruptcy Law."—39 American Law Register, N. S., 656.

"The Co-efficients of Immunity."—39 American Law Register, N. S. 647.

"The Proper Preparation for the Study of Law."—39 American Law Register, N. S. 635.

"When the Impossible Excuses."—20 Canadian Law Times, 359.

"Is an Interpleader Proceeding an Action."—20 Canadian Law Times, 347.

"Preparation for Trial; Witnesses and Their Examination."—3 Brief of Phi Delta Phi, 1.

"Railway Reorganization."—8 American Lawyer, 507-514.

"Is There Any Property in the Title of a Book or Play?"—8 American Lawyer, 506.

"An Interesting Question of Proximate Cause."—62 Albany Law Journal, 330.

"Assignee for Benefit of Creditors."—62 Albany Law Journal, 327.

"Husband and Wife; Action; Alienation; Evidence."—62 Albany Law Journal, 324.

"Insurance in Its Relation to the Commerce Clause of the Federal Constitution."—39 American Law Register, N. S. 717.

"Trade Organizations for the Collection of Debts Due Members by Means of Boycott."—39 American Law Register, N. S. 691.

"Completion of Contracts by Mail or Telegraph."—39 American Law Register, N. S. 354.

"Status of Inhabitants of Territory Acquired by Discovery, Purchase, Cession, or Conquest, According to the Usage of the United States."—39 American Law Register, N. S. 332.

"Has the Study of Law a Place in a Liberal Education?"—39 American Law Register, N. S. 321.

"Essentials of a Valid Marriage in Virginia."—6 Virginia Law Register, 2.

"Ignorance or Mistake of Law a Ground for Equitable Relief."—6 Western Reserve Law Journal, 125.

"The Negotiable Instruments Law."—14 Harvard Law Review, 241.

The Humorous Side.

STRENUOUS LITIGATION.—The plaintiff in a recent New York case was one "Earnest Kuss." The defendant was "Fried."

A GOOD RETURN FOR HIS MONEY.—In a village of Western New York in antebellum days there lived a justice of the peace whom they called Squire H. An action was brought before him against the railroad company whose road ran through the village, by a woman for killing her cow. The road, of course, defended the action, and on the trial it developed that the cow was killed by the sixteen-year-old son of the plaintiff leading her on the track immediately in front of the train. The squire, however, was there to convict, and a judgment was rendered for the plaintiff. The railroad appealed, of course, and, of course also, the judgment was reversed. Colonel M—, a lawyer of a neighboring village, in conversation with Mr. C—, the counsel for the railroad company, said, "C—, how did you manage to get a return from Squire H— on which you could reverse that judgment? We have always had trouble in that respect. They are generally garbled as to the facts so as to sustain the judgment." "My dear fellow," said C—, "do you imagine for a moment that in paying Squire H— for his return I limited him to that niggardly sum provided by statute?"

BEATS THE STORY OF JONAH.—The lilliputian dimensions of a defendant whose place of residence was stated in an affidavit to be in a lock box of the Boston postoffice are in striking contrast with the extraordinary capacity of an old lady mentioned in the judge's headnote of a recent case on the subject of a contract by which she gave all her property in return for support. In reciting the performance of the contract by the other parties, the judge says: "In pursuance of such contract they move into and take charge of her and her property." This moves some Texas attorneys to write as follows: "Presuming that the headnote correctly states the case, we are prompted to say that this is a most marvelous illustration of the saying that 'we are fearfully and wonderfully made.' We can also now understand in a new light what Christ said about a camel going through the eye of a needle, for that surely is not a more wonderful feat than one B. and his wife accomplished when they 'moved into' the old lady. We do not wonder that her kinsfolk deserted her. Truly the age of miracles is not past." An ancient prophet is said to have lived in a whale for three days. This veracious judge states that two persons moved into this old lady and lived there.

WILLING TO BE USEFUL.—An Ohio attorney, who seems to be a stickler for professional etiquette, puts in the local paper this kindly reminder of his willingness to serve.

Attention, Litigants.

Thanking the people of —— and vicinity for your liberal patronage in the past year, and hoping to receive a share of your legal work in the future, I extend to all a hearty invitation to drop in and see me. Don't wait for me to call on you personally and solicit your work, as such proceedure on my part would be considered by the legal fraternity as being unprofessional. If you think you have a legal or equitable cause of action against your neighbor, call at my office; give me the status of your case and receive counsel absolutely free of charge.

The old adage that "talk is cheap unless you have a lawyer to do it for you," does not apply in our ward.

Also having recently been admitted to practice in the department of the Interior and Bureaus thereof, I am now prepared to prosecute all claims for pensions, bounty or pay, either original or supplemental and would be pleased to have all persons desiring work done in that line to give me a call.

Yours Truly, —. —. ——,
Attorney-at-Law.